MAR 28 2001

No. 00-767

SUPREME COURT, U.S.
MAR 28 2001
CLERK

In The

Supreme Court of the United States

IMMIGRATION AND NATURALIZATION SERVICE,

Petitioner,

v.

ENRICO ST. CYR,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

1. Whether the district court had habeas corpus jurisdiction over respondent's challenge to his final removal order.

2. Whether the Board of Immigration Appeals properly concluded that respondent is not eligible for discretionary relief from deportation under former 8 U.S.C. 1182(c) (1994) because his removal proceeding was commenced after the repeal of Section 1182(c) became effective, even though he pleaded guilty and was convicted before that date.

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OPINIONS BELOW

The court of appeals opinion, 229 F.3d 406, is reproduced at Pet. App. 1a. The related court of appeals opinion in *Calcano-Martinez v. INS*, 232 F.3d 328, is reproduced at Pet. App. 40a. The opinion of the district court, Pet. App. 74a-91a, is reported at 64 F. Supp. 2d 47. The decisions of the Board of Immigration Appeals, Pet. App. 94a-95a, and the immigration judge, Pet. App. 96a-97a, are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 1, 2000. The petition for a writ of certiorari was filed on November 14, 2000, and was granted on January 12, 2001. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are identified in the Brief for the Petitioner ("Pet. Br.") 1-2 and are set forth at Pet. App. 98a-114a.

INTRODUCTION

This case concerns a new statute governing the deportation of legal permanent residents based on criminal convictions. The jurisdictional issue is whether any court can review the pure question of law presented here. The merits issue is whether legislation enacted in 1996 that eliminated discretionary relief for certain legal residents and compelled their deportation applies retroactively to alter the legal consequences of events that occurred before the change in law.

Prior to 1996, legal permanent residents with seven years residence in the United States who committed a deportable offense were statutorily eligible to apply for a waiver of deportation, provided that they did not actually serve five years in prison for an "aggravated felony" conviction. The decision whether to grant a waiver was made by an immigration judge ("IJ") before a final deportation order was

issued and was based on a balancing of equitable considerations, both positive and negative. In 1996, Congress imposed a new restriction on eligibility for deportation relief by barring relief for all aliens convicted of an "aggravated felony" regardless of the length of time (if any) of imprisonment. As a result, those legal residents who were eligible for relief under prior law because they had served fewer than five years in prison are now effectively subject to mandatory deportation under the new law.

While Congress may have broad constitutional power to impose new restrictions on deportation relief, including new restrictions governing conduct and events that pre-date the change in law, that is not the issue in this case. Rather, the question is whether Congress unambiguously expressed an intent to reach pre-enactment events. If it did not, the new provision does not apply retroactively to impose new disabilities or legal consequences as a result of the law's change.

There is good reason for Congress to have distinguished between prospective and retroactive application of the new statute. The prospective elimination of deportation relief applies to recent misconduct that Congress has concluded warrants mandatory deportation. Retroactive elimination of relief, by contrast, applies to immigrants whose misconduct may have occurred years before the law changed or who made decisions in their criminal cases, including whether and how to plead, without any warning that those decisions would effectively lead to mandatory deportation. The 1996 laws do not contain any express manifestation that Congress intended that result.

STATEMENT

1. *Jurisdiction.* The jurisdictional questions raised here and in the companion case, *Calcano-Martinez v. INS*, No. 00-1011, are whether any court has jurisdiction to resolve the statutory retroactivity issue respondent raises, and whether the proper mechanism for review of that claim is a district court habeas corpus action under 28 U.S.C. 2241 or a court of appeals petition-for-review proceeding under 8 U.S.C. 1252.

2. *Section 1182(c).* a. The immigration statutes have long included waiver provisions for immigrants with substantial equities. The early version of the waiver at issue here was the Seventh Proviso of the Immigration Act of 1917, 39 Stat. 874, 878. Relief under the Seventh Proviso was available to any alien with seven years of unrelinquished domicile in the United States. The provision at issue here, 8 U.S.C. 1182(c) (1994), appeared in 1952 when Congress enacted the current Immigration and Nationality Act ("INA"), 8 U.S.C. 1101 *et seq.*

The Section 1182(c) waiver determination is made before entry of a deportation order. Deportation proceedings are commenced when the Immigration and Naturalization Service ("INS") charges a person with deportability. At the immigration hearing, the first question is whether the individual is in fact a deportable alien based on one of the grounds enumerated in the INA. That question may be contested or conceded. If alienage and deportability are established, the IJ turns to whether the alien qualifies for relief from deportation. That adjudication is required and encompasses both whether the alien is eligible and, if eligible, whether relief should be granted. *See* 8 C.F.R. 212.3 (directing that the IJ "shall adjudicate" an application for relief under Section 1182(c) made during a deportation or exclusion proceeding); *Matter of Marin*, 16 I. & N. Dec. 581, 584 (BIA 1978) (stating that each application for relief "must be judged on its own merits").

If granted, Section 1182(c) gives full relief and causes termination of the immigration proceedings. The permanent resident retains his legal permanent resident status and is not subject to deportation based on the criminal conviction that caused the INS to initiate proceedings. *See Matter of Gordon*, 20 I. & N. Dec. 52 (BIA 1989). The Section 1182(c) adjudication is based on established equitable factors guided by sixty years of BIA precedent. *See Marin*, 16 I. & N. Dec. at 584-85 (reviewing BIA precedents and listing factors to be considered); *Matter of L-*, 1 I. & N. Dec. 1, 7 (BIA 1940). The factors that the IJ is required to consider in a waiver hearing include: family ties; residence of long duration (especially

when residence began at a young age); evidence of hardship to the respondent and family if deportation occurs; service in this country's Armed Forces; a history of employment; the existence of property or business ties; evidence of value and service to the community; proof of genuine rehabilitation; and other evidence attesting to a respondent's good character. *See Marin*, 16 I. & N. Dec. at 584-85.[1] In the years prior to 1996, relief under Section 1182(c) was awarded in approximately half of all cases. *See Goncalves v. Reno*, 144 F.3d 110, 128 (1st Cir. 1998) (citing Department of Justice statistics), *cert. denied*, 526 U.S. 1004 (1999).

b. Before 1996, the statutory eligibility criteria for relief under Section 1182(c) precluded relief for immigrants who were convicted of an "aggravated felony" and who actually served five years in prison for that crime. In 1996, Congress enacted a new bar to relief by providing that any aggravated felony conviction eliminated eligibility for relief regardless of the length (if any) of imprisonment. Initially, Section 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214, amended

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[1] *See also Matter of Roberts*, 20 I. & N. Dec. 294, 301 (BIA 1991) (upholding denial of relief in light of absence of evidence of genuine rehabilitation and seriousness of conviction); *Matter of Edwards*, 10 I. & N. Dec. 506 (BIA 1964) (ordering relief under Section 1182(c), despite evidence that his family would be self-supporting and two larceny convictions, for 54-year-old man who immigrated at the age of 7, had served in the armed forces, and who had lived under the good-faith but erroneous belief that he was a citizen); *Matter of M-*, 5 I. & N. Dec. 598 (BIA 1954) (ordering award of Section 1182(c) relief to 68-year-old man with legal resident wife, citizen children, and unblemished record since conviction in 1923 for which he served four years in prison); *Matter of K-*, 1 I. & N. Dec. 79 (BIA 1941) (perjury in naturalization proceedings outweighed by thirteen years of clear record and equitable factor of dependent citizen wife). The Board has cautioned that an IJ must examine all of the positive and negative factors in deciding whether to award relief. *See Matter of Buscemi*, 20 I. & N. Dec. 191 (BIA 1990).

former Section 1182(c) to impose this *per se* "aggravated felony" bar to eligibility. Then, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, Div. C., 110 Stat. 3009-546, retained the *per se* bar when it recodified and replaced Section 1182(c) with a provision called "cancellation of removal." That replacement provision now appears at 8 U.S.C. 1229b(a). A "cancellation of removal" adjudication considers the same equitable factors as Section 1182(c) relief and is governed by the same BIA precedent. *In re C-V-T-*, Int. Dec. No. 3342, 1998 WL 151434 (BIA 1998). The "cancellation" statute carries forward the prohibition enacted by AEDPA and provides that immigrants who are deportable based on any aggravated felony are barred from applying for relief, regardless of the term of imprisonment (if any) actually served.

3. Enrico St. Cyr was admitted to the United States on June 17, 1986 as a lawful permanent resident. Pet. App. 2a. His parents and sister are citizens of the United States, and his brother is a lawful permanent resident. Pet. App. 2a.

On March 8, 1996, Mr. St. Cyr was convicted based on a guilty plea to the sale of a controlled substance. Under the then-governing immigration statute, the conviction subjected Mr. St. Cyr to deportation, which was not mandatory because he was eligible to seek a waiver under Section 1182(c). On April 10, 1997, the INS commenced removal proceedings against Mr. St. Cyr on the basis of his conviction. Pet. App. 3a. When Mr. St. Cyr sought to apply for relief under Section 1182(c), the IJ ruled that he had been rendered statutorily ineligible on the ground that he had been placed into immigration proceedings after IIRIRA's effective date, April 1, 1997. Pet. App. 95a. The IJ issued an order of removal, and the BIA affirmed on the same ground.[2]

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[2] In response to respondent's argument that he was eligible for relief under Section 1182(c), the BIA simply stated: "We disagree as section [1182(c)] relief is not available in removal proceedings, which [Mr. St. Cyr] is properly in. Section [1182(c)]

Mr. St. Cyr filed a habeas corpus petition in district court challenging the BIA's legal ruling that he was statutorily ineligible to apply for relief under Section 1182(c). The district court held that it had jurisdiction to hear respondent's claim under 28 U.S.C. 2241 and, on the merits, held that he remained eligible to apply for relief under the immigration law that governed when he pled guilty. Pet. App. 82a, 87a.

The court of appeals affirmed. The court unanimously held, based on its simultaneously-issued decision in *Calcano-Martinez v. INS*, that the district court properly exercised jurisdiction over Mr. St. Cyr's claims. Pet. App. 6a. A majority of the panel further held that depriving him of the opportunity to apply for relief under the law that governed when he pled guilty constituted a retroactive application of the new legislation under *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), and *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939 (1997).

The court of appeals first held that neither AEDPA nor IIRIRA contained express language demonstrating that Congress intended to eliminate eligibility for relief for those, like Mr. St. Cyr, who pled guilty to a disqualifying criminal offense before the enactment of AEDPA and IIRIRA. Pet. App. 16a-17a. The court therefore proceeded to determine whether the statutes had an impermissible retroactive effect. The court noted that legal residents who are charged with a crime "carefully consider[] the immigration consequences of . . . [a] conviction and, specifically, the availability of discretionary relief from removal." Pet. App. 27a-28a. It recognized that defense attorneys have a professional obligation to consider immigration consequences in advising an immigrant defendant about the consequences of a plea. It further observed that a resident alien is part of a community and

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was repealed by section 304(b) of [IIRIRA], and was replaced with cancellation of removal under Section 240A[.]" Pet. App. 95a.

"is likely aware of what happens to other members of the community who engage in criminal conduct." Pet. App. 28a. The court recognized that preserving the right to remain in the United States might be the most important factor in a plea negotiation. The court of appeals held that under the new statute "settled expectation[s] [are] upset dramatically," Pet. App. 29a, because eliminating the possibility of relief "alter[s] the substantive rights of aliens subject to removal proceedings," Pet. App. 30a, and "eradicates a form of relief previously available," *id.* Therefore, the court of appeals concluded, the change in law "attach[es] new legal consequences" to pre-enactment pleas and hence has "an impermissible retroactive effect." *Id.* Judge Walker joined the majority on the jurisdictional ruling but dissented on the merits.

SUMMARY OF ARGUMENT

1. The court of appeals correctly held that, in the absence of petition-for-review jurisdiction, respondent's pure question of law was reviewable in the district court under 28 U.S.C. 2241. Neither the statutes themselves (nor the legislative history) contain the express directive that is required to effectuate a repeal of habeas corpus. *See Felker v. Turpin*, 518 U.S. 651 (1996).

2. The presumption against retroactive statutes is one of the bedrock principles of the rule of law. Two years before the enactment of the laws at issue here, the Court reaffirmed that a statute will not be applied retroactively absent an unambiguous directive from Congress. *See Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994). That requirement serves to ensure that "Congress itself has determined that the benefits of retroactivity outweigh the potential for disruption or unfairness." *Id.* at 268.

First, with regard to this statute, Congress did not provide an unambiguous directive regarding the temporal scope of the new statutory provision. IIRIRA contains a number of express temporal provisions, but none

addresses the provision governing eligibility for Section 1182(c) relief. The government seeks authorization for retroactive application from an effective date provision. But *Landgraf* expressly rejected reliance on such provisions. The government also argues for a retroactive scope by drawing an inference from other provisions, but retroactivity cannot be inferred.

Second, application of the new statute has a retroactive effect. The prior opportunity to seek a waiver of deportation – to present one's individual equities and have a decision made on the basis of these equities – is eliminated. As such, for many longtime lawful permanent residents, the statute transforms the possibility of deportation into a certainty based on acts or events that predate the change in law. Retroactive application therefore deprives permanent residents of notice and upsets their settled expectations and reasonable reliance.

Third, the government's suggestion that retroactivity concerns play no role in the immigration setting is contradicted by this Court's decisions. Such a suggestion conflates the constitutional power of Congress to enact retroactive legislation with the question of whether Congress has in fact legislated with the requisite specificity to achieve retroactive application.

ARGUMENT

I. RESPONDENT'S RETROACTIVITY CLAIM MAY BE RAISED IN A SECTION 2241 HABEAS ACTION IN THE ABSENCE OF PETITION-FOR-REVIEW JURISDICTION.

The court of appeals held, on the basis of its companion decision in *Calcano*, that 8 U.S.C. 1252(a)(2)(C)[3] eliminated its own petition-for-review jurisdiction over all

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[3] Section 1252(a)(2)(C) provides that "[n]otwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is

claims challenging an alien's eligibility for a waiver of deportation, but that neither Section 1252(a)(2)(C) nor any other provision of the 1996 amendments bars access to 28 U.S.C. 2241 habeas jurisdiction over "pure legal" claims. Pet. App. 73a; *see generally id.* at 68a-73a. The government maintains that the Second Circuit erred and argues that the 1996 amendments vest the courts of appeals with exclusive jurisdiction over final orders. The government further maintains that, contrary to the Second Circuit's construction of the statute, Section 1252(a)(2)(C) should not be read to bar aliens from raising substantial constitutional claims in the courts of appeals. The government argues, however, that the 1996 amendments preclude all judicial scrutiny of statutory claims challenging an alien's eligibility for a waiver and that such complete preclusion of judicial scrutiny raises no constitutional concerns.

To avoid repetition with the briefing in *Calcano*, this brief addresses only certain of the government's arguments. The *Calcano* petitioners, who filed both petitions for review and Section 2241 habeas actions, have addressed three questions: (i) whether the bar on the circuit courts' petition-for-review jurisdiction can be construed to permit review in the court of appeals over the types of statutory and constitutional claims raised here and in *Calcano* (*Calcano* Pets. Br. 17-26, 42-44), (ii) whether Section 2241 jurisdiction is available if petition-for-review jurisdiction is barred over these claims (*id.* at 44-49), and (iii) whether the 1996 amendments are unconstitutional if they preclude review in *any* forum over such statutory and constitutional claims (*id.* at 26-42). Respondent will not address the first and third arguments, because they are fully set forth in *Calcano* and because the respondent here filed only a Section 2241 habeas action. This brief will respond only to the government's contention that the 1996 amendments bar

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removable by reason of having committed a criminal offense covered in [various sections of the Immigration Act]."

Section 2241 habeas jurisdiction and, where appropriate, will also reference the briefing in *Calcano* on that issue.[4]

A. The 1996 Amendments Do Not Contain The Requisite Express Directive To Repeal Section 2241 Under *Felker* and *Ex Parte Yerger.*

The government maintains that AEDPA's and IIRIRA's amendments were intended to eliminate Section 2241 jurisdiction over final deportation orders (Pet. Br. 18-19) and that IIRIRA's amendments "reconfirmed" that result (*id.* at 19). As the court of appeals noted, however, none of the amendments made by either AEDPA or IIRIRA expressly mentions Section 2241. Accordingly, under this Court's decisions in *Felker v. Turpin*, 518 U.S. 651 (1996), and *Ex Parte Yerger*, 75 U.S. (8 Wall.) 85 (1869), the Second Circuit properly refused to find that the 1996 amendments eliminated access to Section 2241. *See* Pet. App. 48a-62a (*Calcano* opinion).

Nor does the legislative history of AEDPA and IIRIRA mention Section 2241, or in any way show that Congress focused on the issue of barring access to Section 2241 where no other review would be available over a pure question of law. There is likewise nothing in either Act's history indicating that Congress was aware of the constitutional issues that

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[4] Unlike the *Calcano* petitioners, respondent filed only a Section 2241 district court habeas action. If this Court were to hold that the types of claims raised by respondent may be reviewed – but only in the courts of appeals by petition for review – respondent respectfully requests that his case be remanded to allow the Second Circuit to determine in the first instance whether individuals in respondent's situation may now (1) file a late petition for review, or (2) pursue their Section 2241 actions based on the circuit law that governed at the time they filed. Among other factors, the courts of appeals would have to consider the fairness of penalizing individuals whose decision to file only a district court habeas action was consistent with circuit precedent. *See, e.g., Goncalves v. Reno*, 144 F.3d 110, 116 n.5 (1st Cir. 1998) (noting reliance issue), *cert. denied*, 526 U.S. 1004 (1999).

would be triggered by the total repeal of all review over a question of law or that Congress made the decision to force the courts to confront those delicate constitutional questions.

The government seeks to distinguish *Felker* and *Ex Parte Yerger* on the ground that the statutes in those cases "did not apply at all to this Court's habeas jurisdiction, either explicitly or in categorical terms that necessarily included that jurisdiction." Pet. Br. 24. The government thus argues that those decisions do not prevent the repeal of Section 2241 by a preclusion statute that applies generally. Accordingly, the government contends that the 1996 amendments are sufficient to preclude Section 2241 jurisdiction because they contain a categorical ban on judicial review for aliens deportable on the basis of certain criminal offenses. Yet, nothing in *Felker* or *Ex Parte Yerger* suggests that this Court intended to limit those decisions in such a manner. The point of *Felker* and *Ex Parte Yerger* (and clear statement rules in general) is precisely that they force Congress to legislate explicitly and specifically to eliminate all doubt about whether a general enactment was intended to have a particular effect. Here, the elimination of Section 2241 would necessarily be "by implication" (*Ex Parte Yerger*, 75 U.S. at 105), since none of the 1996 amendments mentions Section 2241.[5]

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[5] In any event, *Felker did* involve a preclusion statute that applied in categorical terms to the type of review sought by the petitioner in that case. The petition filed directly in this Court in *Felker* was denominated an "original" petition in habeas parlance, but it did not fall within the Court's original jurisdiction and was reviewable only under this Court's *appellate jurisdiction*. Consequently, the preclusion language, which stated that an unmeritorious habeas action "shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari," 28 U.S.C. 2244(b)(3)(E), plainly applied to the petitioner's habeas petition; indeed, the language stating that unmeritorious habeas actions "shall not be appealable" would have been entirely superfluous if it did not cover "original" writs filed directly in this Court. Thus, if the government were correct that Section 2241 review may be

B. AEDPA Did Not Eliminate Section 2241 Habeas Jurisdiction.

The government places substantial emphasis on the role of AEDPA. However, even apart from the *Felker* express statement rule, the government has not demonstrated that in AEDPA Congress made a decision to bar all avenues of review, including Section 2241. As an initial matter, AEDPA's amendments have no independent force here. AEDPA amended the INA's former judicial review scheme, but IIRIRA repealed that scheme altogether (along with AEDPA's amendments) and replaced it with a new scheme (codified at 8 U.S.C. 1252 *et seq.*). *See* IIRIRA § 306(b), 110 Stat. 3009-612 (repealing old judicial review scheme in 8 U.S.C. 1105a *et seq.*). The new scheme created by IIRIRA now governs cases, like respondent's, where immigration proceedings commenced after April 1, 1997. *Calcano* Pets. Br. 15.

In any event, even if AEDPA were still controlling, its amendments did not bar access to Section 2241.[6] The government bases its reading of AEDPA's amendments in significant part on its understanding of the relationship between AEDPA and enactment of 8 U.S.C. 1105a in 1961. The government acknowledges that the 1961 amendments eliminated only district court actions for declaratory and injunctive relief under the Administrative Procedure Act, and not habeas jurisdiction. *See* Pet. Br. at 4-6, 19; *Foti v. INS*, 375 U.S. 217, 231 (1963). The government contends, however, that the 1961 amendments preserved habeas jurisdiction over final orders *only* because they contained an explicit provision for habeas jurisdiction in Section 1105a(a)(10), which according to the government acted as an exception to the general

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barred by a categorical ban that fails to mention Section 2241, the statute in *Felker* would have been sufficient. Yet the Court held that it was not sufficiently explicit because it nowhere specifically mentioned Section 2241. *Felker*, 518 U.S. at 661.

[6] In addition to the Second Circuit, nine other circuits have also held that AEDPA's amendments did not repeal Section 2241. *See Calcano* Pets. Br. 4 n.3 (citing circuit case law).

provision in Section 1105a(a) vesting the courts of appeals with "sole and exclusive" jurisdiction over final orders. Based on this premise, the government contends that when AEDPA § 401(e), 110 Stat. 1268, subsequently repealed Section 1105a(a)(10), Congress thereby eliminated all habeas jurisdiction, including under Section 2241, and left the courts of appeals with sole and exclusive jurisdiction.

The government's argument hinges on demonstrating both that the 1961 amendments would have eliminated Section 2241 in the absence of the specific INA habeas provision in former Section 1105a(a)(10) and that the AEDPA Congress, acting 35 years later, intended to bar access to Section 2241 when it repealed that former INA habeas provision. The government has made neither showing.

The 1961 Act's "sole and exclusive" provision in former Section 1105a(a) nowhere mentions Section 2241 (or even habeas jurisdiction generally). Nor does the legislative history demonstrate that the 1961 Congress believed that the Act would have barred habeas jurisdiction in the absence of Section 1105a(a)(10). From the beginning, the focus of the 1961 amendments was *not* on eliminating habeas jurisdiction but rather on the fact that the 1952 Immigration Act had given aliens the right to bring APA "lawsuits" in district court for declaratory and injunctive relief. The goal of the 1961 amendments was to eliminate these APA lawsuits, and indeed, the drafters consistently stated that the amendments were never intended to eliminate habeas corpus: "Nothing contained in the bill is, or can be, designed to prevent an alien from obtaining review by habeas corpus." 104 Cong. Rec. 12,726 (July 6, 1959) (statement of Rep. Walter, chief sponsor). *See also* 104 Cong. Rec. 17,173 (Aug. 12, 1958) (statement of Rep. Walter) (noting that habeas corpus was an "expeditious" means of review and stating that courts would be "relieved of a great burden" once declaratory actions were eliminated); H.R. Rep. No. 2478, 85th Cong., 2d Sess. 9 (Aug. 6, 1958) ("[H]abeas corpus is a far more expeditious judicial remedy than that of declaratory judgment.").

Given the focus on eliminating APA declaratory and injunctive lawsuits, nothing in the history of the 1961 Act

suggests that the drafters intended for the "sole and exclusive" language to do anything more than eliminate an alien's right to bring such district court suits. The express habeas provision in Section 1105a(a)(10) appears to have been added simply out of an abundance of caution to assuage those who expressed concerns about the constitutionality of eliminating habeas corpus. *See* 104 Cong. Rec. 17,172, 17,175 (Aug. 12, 1958).[7] The only point that emerges from the 1961

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[7] The government's legislative history citations, Pet. Br. 5 n.2, 6, do not show that the "sole and exclusive" language was intended to eliminate habeas jurisdiction. Representative Walter first proposed his bill, along with its "sole and exclusive" language, in May 1958. *See* 104 Cong. Rec. 8,632 (1958). At that time, the bill did not contain the express habeas provision of 1105a(a)(10), which was only added after Judiciary Committee consideration. *See* H.R. Rep. No. 2478, 85th Cong., 2d Sess. No. 2 (1958) (describing amendment). The government cites Representative Walter's statement that habeas review could not constitutionally be foreclosed in support of its claim that the "sole and exclusive" language would have eliminated habeas jurisdiction absent Section 1105a(a)(10), Pet. Br. 5 n.2 (citing subcommittee hearing). However, the statement on which the government relies was made *before* Representative Walter proposed enactment of the *first* version of his bill, which included the "sole and exclusive" language but not the express habeas provision later added by the Judiciary Committee. *See* 104 Cong. Rec. 8,632 (1958) (introducing first version of his bill); 104 Cong. Rec. 13,104 (1958) (introducing second version). Thus, given his view that habeas had to be preserved, he likely believed that the bill he proposed – with the sole and exclusive language but not the habeas provision – nonetheless preserved habeas jurisdiction.

As further support for its position, the government also quotes a portion of the Committee Report saying that habeas jurisdiction was preserved as an exception to the courts of appeals' otherwise exclusive jurisdiction. Pet. Br. 6. However, that quotation is equally consistent with respondent's view that the habeas provision was merely declarative of the drafters' understanding that the sole and exclusive language was never

amendments is that Congress's focus was on eliminating APA actions and that Congress did not intend to eliminate habeas corpus.

The intent of the AEDPA Congress is similarly unclear. AEDPA § 401(e), the provision which repealed the former INA habeas provision in Section 1105a(a)(10), specifically mentions only Section 1105a(a)(10) and contains no reference to Section 2241. The government contends, however, that the title of the provision should be taken as evidence that Congress was seeking to eliminate *all* habeas review, and thus, that Section 2241 is no longer available. Pet. Br. 19, 24. Yet the title of a provision cannot enlarge its meaning and AEDPA § 401(e) specifically repeals only former Section 1105a(a)(10). *See* 1A J. Sutherland, *Statutory Construction* § 18.07 (5th ed. 1993); *Carter v. United States*, 530 U.S. 255, 267 (2000) (statute does not encompass robbery despite inclusion of "robbery" in title, because provision's text did not mention robbery).[8]

Moreover, Congress had ample reason to want to eliminate the former INA habeas provision in Section 1105a(a)(10), wholly unrelated to any desire to take the unprecedented step of eliminating access to the independent grant of habeas jurisdiction in Section 2241. In particular, the courts had struggled to make sense of the overlapping and

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intended to foreclose habeas jurisdiction because "[n]othing contained in the bill is, or can be, designed to prevent an alien from obtaining review by habeas corpus." 104 Cong. Rec. 12,726 (July 6, 1959) (statement of Rep. Walter).

[8] The origin of AEDPA § 401(e) casts further doubt on the government's position because the provision originated in the House as part of a series of provisions specifically related to removing alien terrorists. *See* H.R. 2703, 104th Cong., Title VI, Subtitle A, § 601 *et seq.* (1996). Provisions relating generally to deportation procedures, and specifically to judicial review of criminal aliens' deportation orders, were in a separate subtitle of the bill. *See* H.R. 2703, 104th Cong., Title VI, Subtitle E, § 661 *et seq.* (1996). Nor does anything in AEDPA's legislative history explain the purpose of AEDPA § 401(e)'s repeal of the habeas provision in Section 1105a(a)(10).

confusing provisions in the 1961 Act. Congress may thus have hoped to eliminate the confusion by repealing Section 1105a(a)(10), leaving only the traditional and narrow scope of habeas jurisdiction under Section 2241. *See Cannon v. Univ. of Chicago*, 441 U.S. 667, 694 (1979) (presuming congressional awareness of lower court decisions).[9]

C. IIRIRA Did Not Eliminate Section 2241 Habeas Jurisdiction.

The government argues that IIRIRA "reconfirmed" that the district courts lack Section 2241 habeas jurisdiction to review legal claims challenging a final order. Pet. Br. 19. But as the court of appeals correctly found, and as the *Calcano* brief addresses, the IIRIRA provisions on which the government relies do not specifically address the question of the availability of Section 2241 habeas jurisdiction where no other avenue of review is available for pure legal claims. *See Calcano* Pets. Br. 46-49 (discussing 8 U.S.C. 1252(a)(1), (b)(9), (a)(2)(C)). Although IIRIRA generally channels review to the courts of appeals, and thereby divests the district courts of APA-type jurisdiction, it does not explicitly eliminate Section 2241 jurisdiction.

The government places reliance on 8 U.S.C. 1252(b)(9) and the Court's reference to that provision as a "zipper"

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[9] For example, some courts had assumed that habeas jurisdiction existed under *both* Section 2241 and Section 1105a(a)(10), thereby creating an unnecessary redundancy. *See Orozco v. U.S. INS*, 911 F.2d 539 (11th Cir. 1990); *Sotelo Mondragon v. Ilchert*, 653 F.2d 1254 (9th Cir. 1980). Courts also struggled over the scope of habeas jurisdiction and the circumstances under which it could be invoked. *See, e.g., Galaviz-Medina v. Wooten*, 27 F.3d 487 (10th Cir. 1994); *Daneshvar v. Chauvin*, 644 F.2d 1248 (8th Cir. 1981); *United States ex rel. Marcello v. District Director*, 634 F.2d 964 (5th Cir. 1981).

clause in *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471 (1999) ("*AADC*"). Pet. Br. 20, 24.[10] That reference, however, was made with respect to the scope of Section 1252(b)(9)'s *coverage – i.e.*, the type of determinations to which it applied. *See Calcano* Pets. Br. 46 & n.17 (discussing Section 1252(b)(9)). The Court stated in *AADC* that Section 1252(b)(9) channels review of a wide range of immigration actions to the courts of appeals. But the Court did not comment on the analytically distinct question of whether Section 1252(b)(9) repealed Section 2241 habeas jurisdiction in cases where there was no review in the court of appeals. 525 U.S. at 480 n.7 (leaving open habeas issue).

The Court's reference to Section 1252(b)(9) as a "zipper clause" is best understood in historical context. As the Court noted in *AADC*, the 1961 amendments had been construed to channel review of final orders of deportation to the courts of appeals, but to allow the district courts to exercise traditional jurisdiction over other types of claims that were viewed as being outside of a "final order." 525 U.S. at 485. Section 1252(b)(9) now ensures that review of these other claims will be channeled to the courts of appeals as part of the review of the final order. That change, however, has no significance for the issue in this case. No court has disputed that review of final orders is generally channeled to the courts of appeals where such review is available; indeed, even under the 1961 Act, review of final orders was channeled to the courts of appeals. The issue here is whether the Court should find a repeal of Section 2241 in the absence of an express directive if no other avenue of review is available over a final order.

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[10] Section 1252(b)(9) provides: "Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this title shall be available only in judicial review of a final order under this section."

The government also notes that one of the provisions added by IIRIRA – 8 U.S.C. 1252(e)(2) – provides for habeas jurisdiction for a limited class of aliens (those arriving at ports of entry) and argues that this limited habeas provision creates a negative inference that habeas jurisdiction is foreclosed for all other aliens. Pet. Br. 20, 23. But under the *Felker/Ex Parte Yerger* rule, the Court has not permitted Section 2241 to be repealed by inference. The grant of habeas jurisdiction to one group cannot be the basis for finding a repeal with respect to another group.

Finally, respondent notes that the government's contention that the 1996 amendments unequivocally placed all review over final orders in the circuits is at odds with the position it initially advanced. When AEDPA went into effect in April 1996, immigrants did not initially seek district court habeas review, but instead sought to preserve review in the courts of appeals by petitions for review, arguing that the 1996 amendments were unconstitutional if they divested the courts of jurisdiction to review legal claims. The courts of appeals nonetheless dismissed the petitions for review and avoided the constitutional questions that would be raised by a complete preclusion of review by either expressly acknowledging the availability of habeas jurisdiction or leaving open that possibility.[11]

During this early litigation, the government did not consistently take the position that it advances here – that the 1996 amendments cannot plausibly be read to preserve Section 2241 habeas review. In this Court, for example, when immigrants sought review of the dismissal of their petitions for review and argued that the Suspension Clause guaranteed review over their deportation orders, the government opposed certiorari and stated that the Suspension Clause

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[11] *See, e.g., Kolster v. INS*, 101 F.3d 785 (1st Cir. 1996); *Hincapie-Nieto v. INS*, 92 F.3d 27 (2d Cir. 1996); *Salazar-Haro v. INS*, 95 F.3d 309 (3d Cir. 1996), *cert. denied*, 520 U.S. 1239 (1997); *Williams v. INS*, 114 F.3d 82 (5th Cir. 1997); *Mansour v. INS*, 123 F.3d 423 (6th Cir. 1997); *Chow v. INS*, 113 F.3d 659 (7th Cir. 1997); *Boston-Bollers v. INS*, 106 F.3d 352 (11th Cir. 1997).

question was not properly presented because the alien "ha[d] not sought a writ of habeas corpus." Brief for the Respondent [INS] in Opposition at 9, *Qasguargis v. INS* (No. 96-806), *cert. denied*, 519 U.S. 1148 (1997).[12] In contrast, the government now states that any review required by the Suspension Clause should be provided only in the courts of appeals by petition for review "either as a matter of statutory construction or one of constitutional imperative," Pet. Br. 31, and that "all questions concerning the 'interpretation' and 'application' of the Suspension Clause and Section 1252(a)(2)(C)'s preclusion of review" must be raised by petition for review, *id.* at 31 (quoting 8 U.S.C. 1252(b)(9)).

In sum, nothing in the 1996 amendments supplies the type of unequivocal evidence required to repeal Section 2241 where no other commensurate avenue of review is available to test an administrative deprivation of liberty. The overarching fact is that Congress did not focus on Section 2241: the text and legislative history of the 1996 amendments do not mention Section 2241, and in marked contrast to the 1961 Congress, the AEDPA and IIRIRA Congresses did not give any attention to the constitutionality of a statute that would eliminate access to habeas corpus for aliens facing deportation. Under these circumstances, the Court should not presume that Congress intended to abrogate the minimal level of habeas review consistently available since Congress first began regulating immigration at the turn of the twentieth century.

II. THE NEW PROHIBITION ON RELIEF DOES NOT APPLY TO PRE-ENACTMENT EVENTS.

Just two years prior to the enactment of AEDPA and IIRIRA, this Court reaffirmed Congress's duty to mandate the temporal scope of a new statute if it intends the law

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[12] *See also* Brief for the [INS] at 15, *Chamorro-Torres v. INS* (No. 96-985), *cert. denied*, 520 U.S. 1103 (1997); Brief for the [INS] at 23, *Katsoulis v. INS* (No. 97-379), *cert. denied*, 522 U.S. 1027 (1997).

to apply retroactively. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 266 (1994). Emphasizing that the presumption against retroactive statutes is "deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic," *id.* at 265, this Court made clear that courts will not apply a statute retroactively absent an unambiguous directive from Congress.[13] The Court explained that the requirement of express legislation is designed to "ensure that Congress itself has determined that the benefits of retroactivity outweigh the potential for disruption or unfairness." *Id.* at 268. *See also Martin v. Hadix*, 527 U.S. 343 (1999); *Hughes Aircraft Co. v. U.S. ex rel. Schumer*, 520 U.S. 939 (1997); *Lindh v. Murphy*, 521 U.S. 320 (1997); *Rivers v. Roadway Express, Inc.*, 511 U.S. 298 (1994).

The statutory amendments at issue here change the legal consequences of pre-enactment events and trigger the presumption against retroactive legislation. Legal residents affected by these laws made decisions in their criminal cases – including whether and how to plead – on the basis of the law in effect at the time of those decisions. The very decisions that previously *preserved* eligibility for relief now extinguish that opportunity and can result in compulsory deportation. The new provisions enact a major change that denies relief to anyone classified as an "aggravated felon," even if the conviction constituted a misdemeanor or low-level felony offense,[14]

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[13] The presumption mirrors rules applied in countries throughout the world. *See Eastern Enters. v. Apfel*, 524 U.S. 498, 532-33 (1998) (listing countries with similar presumptions). It dates back to antiquity. *See Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 855 (1990) (Scalia, J., concurring).

[14] *See, e.g., United States v. Pacheco*, 225 F.3d 148 (2d Cir. 2000) (misdemeanor larceny of video game constitutes aggravated felony); *United States v. Graham*, 169 F.3d 787 (3d Cir. 1999) (misdemeanor theft offense constitutes aggravated felony); *Arias-Agramonte v. INS*, No. 00-C2412, 2000 WL 1059678 (S.D.N.Y. Aug. 1, 2000) (criminal sale of a controlled substance

and even if the individual never served a day in prison.[15] Indeed, applying the new statutes to past convictions precludes relief for persons whose offenses occurred years or decades in the past,[16] an application that raises distinct considerations that Congress did not address. *See United States v. Carlton*, 512 U.S. 26, 37-38 (1994) (O'Connor, J., concurring) (stating that the government's interest

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in the fifth degree, Class D felony under New York State law, constitutes aggravated felony); *United States v. Holguin-Enriquez*, 120 F. Supp. 2d 969 (D. Kan. 2000) (misdemeanor assault with 365-day suspended sentence constitutes aggravated felony).

[15] *See, e.g., Arias-Agramonte*, 2000 WL 1059678 (sentence of probation for 1977 conviction); *Velasquez v. Reno*, 37 F. Supp. 2d 663 (D. N.J. 1999) (five years probation and $5,000 fine); *Grant v. Zemski*, 54 F. Supp. 2d 437 (E.D. Pa. 1999) (eighteen months reporting probation and a fine). *Cf.* Sentencing Commission, Sentencing Guidelines for United States Courts, 66 Fed. Reg. 7962, 8008 (Jan. 26, 2001) (noting that INA definition of aggravated felony is very broad and proposing lowest level sentencing enhancement for illegal reentry by alien convicted of aggravated felony and sentenced to probation for that conviction).

[16] *See, e.g., Mahadeo v. Reno*, 226 F.3d 3 (1st Cir. 2000) (six years between 1991 conviction and INS initiation of proceedings); *Santos-Gonzalez v. Reno*, 93 F. Supp. 2d 286 (E.D.N.Y. 2000) (thirteen years between 1986 conviction and INS initiation of proceedings); *Pena-Rosario v. Reno*, 83 F. Supp. 2d 349 (E.D.N.Y. 2000) (six years between 1992 conviction and INS initiation of proceedings for petitioner Robinson); *Grant v. Zemski*, 54 F. Supp. 2d 437 (E.D. Pa. 1999) (seven years between 1992 conviction and INS initiation of proceedings); *Thompson v. Reno*, No. 99-C5551, 2000 WL 361675 (E.D. Pa. Apr. 5, 2000) (eleven years between 1988 conviction and INS initiation of proceedings); *Velasquez v. Reno*, 37 F. Supp. 2d 663 (D.N.J. 1999) (eighteen years between 1980 conviction and INS initiation of proceedings); *Zalawadia v. Reno*, No. 99-C1837 (W.D. La. 1999), *petition for cert. pending*, No. 00-268 (three years between 1995 conviction and INS initiation of proceedings).

in new laws must at some point give way to the interest of repose). The far-reaching effect of retroactive application of the new law is illustrated by the cases being held for disposition in the lower courts pending resolution of this case. In one case, for example, a 1977 conviction for a low-level felony offense resulted only in a sentence of probation, yet now compels deportation of a longtime legal resident if Section 1182(c) is barred. In that case, the IJ ruled that the legal resident should be allowed to apply for Section 1182(c) relief and held that the equities overwhelmingly warranted granting relief. The BIA reversed on the same legal ground as it applied in this case, namely that Section 1182(c) is completely foreclosed if the immigration proceeding commenced after April 1, 1997. *See Arias-Agramonte v. INS*, No. 00-C2412, 2000 WL 1059678 (S.D.N.Y. Aug. 1, 2000), *appeal pending*, No. 00-2595 (2d Cir.).

Under this Court's retroactivity jurisprudence, whether a new statute should be applied to past events turns on two inquiries. First, did Congress expressly provide for the statute's temporal reach? Second, does application of the new law to past events have a retroactive effect? *See Landgraf*, 511 U.S. at 280. If Congress has not stated expressly that the statute applies to past events, and if its application would have a retroactive effect, the statute must be limited to prospective application.

A. Congress Did Not Provide Expressly For The New Bars To Relief To Apply To Legal Permanent Residents With Pre-Act Convictions.

For legislation to impose new legal consequences based on past events, the statute must contain an "'unambiguous directive' or 'express command' that the statute is to be applied retroactively." *Martin v. Hadix*, 527 U.S. at 354 (quoting *Landgraf*, 511 U.S. at 263, 280). "[C]ases where this Court has found truly 'retroactive' effect adequately authorized by a statute have involved statutory language that was so clear that it could sustain only one

interpretation." *Lindh v. Murphy*, 521 U.S. 320, 328 n.4 (1997) (collecting cases); *see also Shwab v. Doyle*, 258 U.S. 529, 537 (1922) ("[A] statute should not be given a retrospective operation, unless its words make that imperative . . . .").[17]

Neither AEDPA nor IIRIRA contain the requisite express congressional command or unambiguous language that would support applying the new restrictions on Section 1182(c) relief to immigrants whose conduct or convictions pre-date the change in law. The initial restrictions on relief appeared in AEDPA and were set forth in Section 440(d), 110 Stat. 1277. The courts of appeals that have considered the question have held that AEDPA § 440(d) did not include guidance on temporal applicability with respect to past conduct and convictions and that the proper scope of that section depends on the application of the second step of retroactivity analysis.[18] The government does not argue that AEDPA expressly bars eligibility for Section 1182(c) relief, nor is that an issue encompassed within the grant of certiorari.[19]

IIRIRA likewise contains no explicit language addressing the temporal scope of its prohibition on relief

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[17] When noting the type of language required to make a provision unambiguously retroactive, the Court has analogized to the "clear statement" required to override a state's Eleventh Amendment sovereign immunity. *See Lindh*, 521 U.S. at 328 n.4 (citing *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), *United States v. Williams*, 514 U.S. 527, 531-32 (1995), and *United States v. Nordic Village, Inc.*, 503 U.S. 30, 34-37 (1992)); *see also Landgraf*, 511 U.S. at 288 n.2 (Scalia, J., concurring).

[18] *See, e.g., Mattis v. Reno*, 212 F.3d 31, 36 (1st Cir. 2000) (finding text ambiguous); *Tasios v. Reno*, 204 F.3d 544, 548-52 (4th Cir. 2000) (same); *Requena-Rodriguez v. Pasquarell*, 190 F.3d 299, 307-08 (5th Cir. 1999) (same); *Magana-Pizano v. INS*, 200 F.3d 603, 612-13 (9th Cir. 1999) (same); *Jurado-Gutierrez v. Greene*, 190 F.3d 1135, 1150 (10th Cir. 1999) (same), *cert. denied*, 529 U.S. 1041 (2000).

[19] *See* Questions Presented No. 2, Cert. Pet. at I; *see also* Sup. Ct. R. 14.1(a).

under Section 1182(c). The restrictions enacted by IIRIRA appear in Section 304, 110 Stat. 3009-587. Section 304(a), 110 Stat. 3009-587, re-enacted the substance of the Section 1182(c) waiver provision, maintained the bar on relief for those legal residents who have been convicted of an "aggravated felony," codified the new provision at 8 U.S.C. 1229b, and named it "cancellation of removal." In Section 304(b), IIRIRA then repealed the existing Section 1182(c). Section 304(b) is the only provision in IIRIRA that directly addresses Section 1182(c). It provides, in its entirety, that "Section 212(c) (8 U.S.C. 1182(c)) is repealed." IIRIRA § 304(b), 110 Stat. 3009-597. Nothing in Section 304(b) – nor in any other provision of IIRIRA – explicitly provides a temporal scope or mandates that the repeal of Section 1182(c) should be applied retroactively to conduct or convictions that pre-date AEDPA's or IIRIRA's enactment.

The silence of IIRIRA on Section 304(b)'s temporal reach stands in notable contrast to numerous other provisions in IIRIRA that contain explicit language dictating their temporal scope. In particular, several IIRIRA provisions expressly specify the temporal reach of amendments changing the effect of criminal convictions that pre-date IIRIRA's enactment. For example, IIRIRA § 321(b), 110 Stat. 3009-628, which amends the aggravated felony definition, provides that it applies to "conviction[s] . . . entered *before, on or after*" the date of enactment (emphasis added). Section 321(c), 110 Stat. 3009-628, further provides that the amendment applies "regardless of when the conviction occurred . . . ." Similarly, IIRIRA § 322(c), 110 Stat. 3009-629, which amends the definition of "conviction," provides that it "shall apply to convictions . . . entered *before, on, or after*" the date of the enactment (emphasis added).[20] A multitude of other

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[20] IIRIRA § 321(b), 110 Stat. 3009-628, provides in full: "Notwithstanding any other provision of law (including any effective date), the term applies regardless of whether the conviction

IIRIRA provisions covering a wide range of subjects and appearing throughout the act contain express directives setting forth the temporal scope of new provisions.[21]

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was entered before, on, or after the date of enactment of this paragraph."

IIRIRA § 321(c), 110 Stat. 3009-628, provides in full: "The amendments made by this section shall apply to actions taken on or after the date of the enactment of this Act regardless of when the conviction occurred, and shall apply under Section 276(b) of the Immigration and Nationality Act only to violations of Section 276(a) of such Act occurring on or after such date."

IIRIRA § 322(c), 110 Stat. 3009-629, provides in full: "The amendments made by subsection (a) shall apply to convictions and sentences entered before, on, or after the date of the enactment of this Act. Subparagraphs (B) and (C) of Section 240(c)(3) of the Immigration and Nationality Act, as inserted by Section 304(a)(3) of this division shall apply to proving such convictions."

[21] *See, e.g.*, IIRIRA § 342(b), 110 Stat. 3009-636 (stating that amendment adding incitement of terrorist activity as ground for exclusion "shall take effect on the date of [IIRIRA's] enactment . . . and shall apply to incitement *regardless of when it occurs*[ ]"); IIRIRA § 344(c), 110 Stat. 3009-637 (providing that amendment adding false claims of U.S. citizenship as ground for removal "shall apply to representations made *on or after* the date" of enactment); IIRIRA § 347(c), 110 Stat. 3009-639 (stating that amendments rendering excludable or deportable any alien who unlawfully voted "shall apply to voting occurring *before, on, or after* the date" of enactment); IIRIRA § 348(b), 110 Stat. 3009-639 (stating that amendment providing for automatic denial of discretionary waiver from exclusion under 8 U.S.C. 1182(h) "shall be effective on the date of [IIRIRA's] enactment . . . and shall apply in the case of any alien who is in exclusion or deportation proceedings *as of such date* unless a final administrative order in such proceedings has been entered as of such date[]"); IIRIRA § 350(b), 110 Stat. 3009-640 (stating that amendment adding offenses of domestic violence and stalking as ground for deportation "shall apply to convictions, or violations of court orders, occurring *after* the date" of

These numerous express temporal provisions demonstrate that Congress recognized its obligation to specify the reach of IIRIRA's amendments to the INA to avoid the default rule of prospective application. Furthermore, they demonstrate that Congress focused its attention on the question of the temporal scope of the new provisions in general and the temporal scope of provisions changing

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enactment); IIRIRA § 351(c), 110 Stat. 3009-640 (addressing relationship required for waivers from exclusion or deportation for smuggling and providing that amendments under subsections (a) and (b) "shall apply to applications for waivers filed *before, on, or after* the date" of enactment); IIRIRA § 352(b), 110 Stat. 3009-641 (providing that amendments adding renouncement of citizenship to avoid U.S. taxation as new ground for exclusion "shall apply to individuals who renounce United States citizenship *on or after* the date" of enactment); IIRIRA § 380(c), 110 Stat. 3009-650 (specifying that amendment imposing civil penalties on aliens for failure to depart "shall apply to actions occurring *on or after*" effective date); IIRIRA § 384(d)(2), 110 Stat. 3009-653 (providing that amendments adding penalties for disclosure of information "shall apply to offenses occurring *on or after* the date" of enactment); IIRIRA § 531(b), 110 Stat. 3009-625 (stating that public charge considerations as ground for exclusion or denial of adjustment of status "shall apply to applications [for visa, admission, or adjustment of status] submitted *on or after* such a date"); IIRIRA § 604(c), 110 Stat. 3009-694 (stating that new asylum provision "shall apply to applications for asylum filed *on or after* the first day of the first month beginning more than 180 days after the date" of enactment) (all emphases added). *See also* IIRIRA § 105(b), 110 Stat. 3009-556; IIRIRA § 212(e), 110 Stat. 3009-571; IIRIRA § 309(c)(5), 110 Stat. 3009-627; IIRIRA § 309(c)(7), 110 Stat. 3009-627; IIRIRA § 341(c), 110 Stat. 3009-636; IIRIRA § 376(c), 110 Stat. 3009-649; IIRIRA § 379(b), 110 Stat. 3009-650; IIRIRA § 381(b), 110 Stat. 3009-650; IIRIRA § 382(c), 110 Stat. 3009-651; IIRIRA § 383(b), 110 Stat. 3009-652; IIRIRA § 412(e), 110 Stat. 3009-668; IIRIRA § 421(b), 110 Stat. 3009-670; IIRIRA § 503(b), 110 Stat. 3009-671; IIRIRA § 505(b), 110 Stat. 3009-672; IIRIRA § 551(c), 110 Stat. 3009-679; IIRIRA § 562(e), 110 Stat. 3009-683.

the effect of a pre-enactment criminal conviction in particular. In short, IIRIRA's silence on the temporal scope of Section 304(b) precludes finding that Congress legislated with the "unambiguous directive" that is required to support retroactive elimination of Section 1182(c).

The government addresses four of IIRIRA's provisions that were mentioned by the court of appeals, and seeks to dismiss them as "miscellaneous minor amendments" that deal mostly with criminal aliens. Pet. Br. 38 & n.20. In fact, provisions concerning criminal convictions and aggravated felonies are especially relevant because they concern the same subject matter that is at issue in Section 1182(c). *See Lindh*, 521 U.S. at 330. The government also attempts to explain away the significance of the explicit temporal provisions in Sections 321 and 322 on the ground that they appear in subtitle III-B, which – the government argues – stands in contrast to subtitle III-A because it "has no general effective date . . . . " Pet. Br. 38. Therefore, according to the government, "Congress addressed the temporal scope of those provisions individually." *Id.* But, of course, subtitle III-B *does* have an effective date – it is the date of IIRIRA's enactment, September 30, 1996, which Sections 321 and 322 both explicitly reference. *See* IIRIRA § 321(c) (applying to "actions taken on or after the date of the enactment of this Act"); IIRIRA § 322(c) (applying "to convictions and sentences entered before, on, or after the date of the enactment of the Act"). The specific temporal provisions, therefore, were not needed to set that date, and they do not do so. Rather, they specify a particular retroactive reach for those particular provisions and thereby satisfy the clear statement requirement. That is the language that is missing from Section 304(b).[22]

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[22] The government also suggests that the contrasting language in other provisions is irrelevant because it appears in a different subsection of subtitle III and originated in different bills. However, explicit temporal language appears throughout

In the absence of any express language dictating a retroactive reach for Section 304(b), the government is forced to rely on inferences. These arguments, however, necessarily acknowledge that an explicit temporal directive is lacking and that the Court should infer a retroactive directive notwithstanding the absence of express language. The presumption against retroactivity prohibits that conclusion.

The first statutory provision to which the government points is the *effective date* provision that governs subtitle III-A. That provision, Section 309(a), 110 Stat. 3009-625, states that most of subtitle A, including Section 304(b)'s repeal of Section 1182(c), is effective on April 1, 1997. As *Landgraf* emphatically held, however, an effective date provision "does not even arguably suggest that it has any application to conduct that occurred at an earlier date." *Landgraf*, 511 U.S. at 257. The fact that Section 304(b) went into effect on April 1, 1997 (which respondent does not dispute), does not, therefore, provide any support for applying the statute to pre-enactment events. *See id.* at 259; *id.* at 288 (Scalia, J., concurring) (the words "shall take effect " are presumed to mean "shall have prospective effect" and "that presumption is too strong to be overcome by any negative inference . . . .").

The government also appears to suggest that IIRIRA's effective date standing alone has greater significance because Section 304(b) *repealed* rather than amended Section 1182(c). But the presumption against retroactivity applies equally in cases where new legal consequences result from the repeal of a prior provision. *See, e.g., United States v. Magnolia Petroleum Co.*, 276 U.S. 160, 162-63 (1928); *Twenty Per Cent Cases*, 87 U.S. (20 Wall.) 179, 185-88 (1873). Indeed, *all* retroactivity cases, by

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IIRIRA, including in Title III-A. *See, e.g.*, IIRIRA §§ 301(b)(3), 110 Stat. 3009-578; 301(c)(2), 110 Stat. 3009-579; 306(d), 110 Stat. 3009-612.

definition, involve two legal regimes – the old legal regime and the new legal regime. That is true whether the change is by enactment, repeal or amendment. The question in retroactivity cases, therefore, is not *whether* there are two legal regimes, but *which* legal regime should apply to pre-enactment events.

The government then seeks an inference from IIRIRA § 309(c)(1), 110 Stat. 3009-625, which the government labels a "savings" provision, to achieve a retroactive reach for Section 304(b). Pet. Br. 34-36. But Section 309, 110 Stat. 3009-625, nowhere provides an express statement regarding the availability of Section 1182(c) relief. Rather, Section 309(c), entitled "Transition for Aliens in Proceedings," provides the rules for deportation and exclusion proceedings that were pending on the date the new removal system established by IIRIRA went into effect, and sets forth rules for phasing in the new procedural system enacted by Section 304(a). First, in Section 309(a), Congress specified that the effective date for most of the new provisions of subtitle III-A would be the first day of the first month beginning 180 days from the date of enactment, which became April 1, 1997. Next, in Section 309(b), 110 Stat. 3009-625, Congress provided for the promulgation of new regulations to flesh out the many changes introduced by subtitle III-A and instructed that these regulations be in place thirty days prior to the subtitle III-A effective date. Then, in Section 309(c), Congress addressed the interaction of the new procedural system with the old system and provided that proceedings commenced before the subtitle III-A effective date would continue to be conducted without regard to the changes in the law that were to become effective on April 1, 1997. In particular, Section 309(c)(1) provided the "[g]eneral rule" that aliens who were already in exclusion or deportation proceedings on the effective date of Section 309(a) (April 1, 1997) would not be subject to the amendments of subtitle III-A, and that the proceedings (including judicial review) would be conducted without regard to the amendments.

These transition provisions were necessary to avoid the wholesale application of *every* provision of subtitle III-A to pending deportation and exclusion cases. Absent a specific provision exempting pending cases, all of the new IIRIRA procedures would have applied across the board in every case and would have created procedural confusion for cases already in proceedings. *See Landgraf*, 511 U.S. at 285 n.37 (procedural changes presumptively apply to pending cases). Section 304, for example, provides that the new "removal" proceedings are commenced with a Notice to Appear, IIRIRA § 304(a) (new 8 U.S.C. 1404), rather than an Order to Show Cause; includes different criteria for entering an order of removal for those noncitizens who fail to appear at their hearings, IIRIRA § 304(a) (new 8 U.S.C. 1229a(b)(5)); permits video and telephone conferences, IIRIRA § 304(a) (new 8 U.S.C. 1229a(b)(2)(A)); and creates different rules for motions to reconsider and reopen proceedings, IIRIRA § 304(a) (new 8 U.S.C. 1229a(c)(5)). Without Section 309(c)(1), it would have been unclear which set of procedural rules should apply to pending cases.

In effect, the government is arguing that Section 309(c)(1)'s preservation of the pre-existing framework for some cases is sufficient to achieve a retroactive repeal of the substan-tive criteria of Section 1182(c) for other cases. Pet. Br. 35-36. At best, that argument is based on precisely the sort of negative inference that this Court's retroactivity jurisprudence plainly prohibits. As this Court made clear in *Lindh*, "normal rules of construction" are sufficient to find that Congress intended *prospective* application, but a negative inference is not a sufficient legislative authorization for retroactive application. *See Lindh*, 521 U.S. at 325-26 ("'unambiguous directive' is necessary to authorize 'retroactive application'") (quoting *Landgraf*, 511 U.S. at 264); *see also Landgraf*, 511 U.S. at 288 (Scalia, J., concurring) ("The short response to [the negative inference argument] is that refinement and subtlety are no substitute for clear statement.").

Finally, the government seeks to explain the lack of specific language on temporal applicability by arguing that subtitle III-A constituted a comprehensive revision of the INA. It suggests that in the context of such a "comprehensive" revision Congress is under no obligation to state expressly whether substantive changes in eligibility for relief apply to past events. Pet. Br. 33-34. But there is nothing about a "comprehensive" revision that answers the question of temporal applicability.[23] *Landgraf* itself involved a major revision of the civil rights laws, and there the Court held that those revisions, in and of themselves, do not speak to the analytically separate question of whether the amendments should apply to pre-enactment events. *Landgraf*, 511 U.S. at 260-61; *see also Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 308 (1994) (that legislation was passed to restore racial discrimination remedy available under prior case law does not mean that Congress meant to further that purpose with respect to cases arising prior to the new statute); *Barber v. Gonzales*, 347 U.S. 637, 642-43 (1954) (rejecting government's argument that its construction of the statute would further "broad congressional purpose to terminate the United States residence of criminal aliens").

The government protests that the court of appeals has created "a hybrid form of proceeding," Pet. Br. 34, in which aliens in removal proceedings seek to apply for relief from deportation under Section 1182(c). But "removal" is simply a new name for deportation and a person in these proceedings – under either procedural scheme – is charged with being "deportable" under 8

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[23] The government cites to *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976), for the proposition that a comprehensive revision should be understood as implicitly repealing a prior law. The question, however, is not whether Congress repealed Section 1182(c), but whether the repeal applies retroactively to past events.

U.S.C. 1227 ("Deportable Aliens").[24] Now, as before, the INA sets forth the grounds that render aliens "deportable." *See* former 8 U.S.C. 1251 (1994) ("Deportable Aliens"); 8 U.S.C. 1227 (Supp. V 1999) ("Deportable Aliens"). Similarly, the relevant equitable criteria for adjudicating a claim for "cancellation of removal" are the same as for a waiver under Section 1182(c). *In re C-V-T-*, Int. Dec. No. 3342, 1998 WL 151434 (BIA 1998).[25] The only issue is whether respondent is barred from receiving such relief, not the label it is given.

The government's view of Section 304(b) would lead, moreover, to a result that Congress did not specifically contemplate and likely did not intend. The law governing past convictions would depend entirely on the happenstance of when the INS decides to institute proceedings, and would apply to people who were convicted ten or twenty years ago. *See, e.g., Wallace v. Reno*, 24 F. Supp. 2d 104, 115 (D. Mass. 1998) ("For many [immigrants] the connection between conviction and deportation [is] neither [] immediate nor [] direct. Years might elapse between conviction and deportation, with the deportation

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[24] The terms "deportation" and "removal" are interchangeable terms in many parts of the INA. Moreover, Section 1227, which contains the general classes of deportable aliens, continues to contain a provision entitled "waiver of deportation" that applies to certain visa holders. *See, e.g.*, 8 U.S.C. 1227(c) (providing for a "waiver of deportation" to specified classes of immigrants).

[25] Moreover, the government's semantic argument focusing on immigration terminology disregards the fact that the Section 1182(c) waiver was never formally denominated a "waiver of deportation" since it originally arose in "exclusion" proceedings. *See* Pet. Br. 3 n.1 (citing *Francis v. INS*, 532 F.2d 268 (2d Cir. 1976) and *In re Silva*, 16 I. & N. Dec. 26 (BIA 1976)). There is nothing novel in preserving Section 1182(c) for the limited group of legal permanent residents who were eligible for that relief under the law at the time of the event triggering their deportation.

proceedings not triggered by the conviction itself but by a lawful resident's random contacts with the INS."), *aff'd*, 194 F.3d 279 (1st Cir. 1999). *See also Arias-Agramonte*, No. 00-C2412, 2000 WL 1059678 (S.D.N.Y. Aug. 1, 2000); *Velasquez v. Reno*, 37 F. Supp. 2d 663, 664 (D.N.J. 1999). In fact, persons with *lesser* convictions who were not an enforcement priority in earlier times would find themselves subject to a *harsher* legal regime in which they could not seek the relief that they could have sought had the INS moved more promptly to place them in proceedings. *See Mojica v. Reno*, 970 F. Supp. 130, 171 (E.D.N.Y. 1997) ("Retroactivity generally targets those whom the INS once decided *not* to detain and place in deportation proceedings. It denies them the relief that was available to their fellow inmates who had deportation proceedings against them commenced in a timely manner.") (emphasis in original), *aff'd in part sub nom. Henderson v. INS*, 157 F.3d 106 (2d Cir. 1998), *cert. denied*, 526 U.S. 1004 (1999).

Congress could have decided that the passage of time and the intervening conduct of legal residents is irrelevant and that their deportation should be mandatory nonetheless. But application of the new statute to those immigrants poses distinct considerations. IIRIRA does not contain any express manifestation that Congress "affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay . . . ." *Landgraf*, 511 U.S. at 272-73. Absent such explicit language, Congress has not directed that the retroactive elimination of Section 1182(c) relief should apply to pre-enactment events.[26]

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[26] The presumption against retroactivity is underscored by the fact that this case concerns the deportation of a legal permanent resident. The Court has repeatedly noted that it will construe "any lingering ambiguities in deportation statutes in favor of the alien." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987); *see also Costello v. INS*, 376 U.S. 120, 128 (1964). The rule of lenity complements the *Landgraf* rule by assuring that Congress has given due consideration to the extreme

B. Changing The Possibility Of Deportation Into Mandatory Deportation Is A New Legal Consequence.

Whether application of a new law to past events has a retroactive effect depends upon a "common sense functional judgment about 'whether the new provision attaches new legal consequences to events completed before its enactment.' " *Martin v. Hadix*, 527 U.S. 343, 357-58 (1999) (*quoting Landgraf*, 511 U.S. at 270). The Court's evaluation of new legal consequences "is informed and guided by 'familiar considerations of fair notice, reasonable reliance and settled expectations.'" *Martin v. Hadix*, 527 U.S. at 358 (*quoting Landgraf*, 511 U.S. at 270). An impermissible retroactive effect may result, for example, when a statute "increase[s] a party's liability for past conduct," *Landgraf*, 511 U.S. at 280; "attaches a new disability, in respect to transactions or considerations already past," *id.* at 268 (internal citations omitted); "sweep[s] away settled expectations suddenly and without individualized consideration," *id.* at 266; "changes the legal consequences of acts completed before [the new law's] effective date," *id.* at 269 n.23 (internal citations omitted); or "gives a quality or effect to acts or conduct which they did not have or did not contemplate when they were performed," *id.* (internal citations omitted).[27]

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consequence of deportation even in statutes where retroactive application of a new law is not at issue. Where retroactivity does arise, the rule of lenity, like the *Landgraf* rule, assures that a new immigration law will be applied to past conduct only when Congress clearly intended that result.

[27] In defining what constitutes a "retroactive effect," the government cites Justice Story's formulation in *Society for the Propagation of the Gospel v. Wheeler*, 22 F. Cas. 756, 767 (C.C.N.H. 1814). *See* Pet. Br. 45. However, this Court has held that Justice Story's formulation "does not purport to define the outer limit

For many lawful permanent residents, the change in law at issue would convert a possibility of deportation into a certainty. Respondent's opportunity to seek a waiver of deportation would be extinguished. As a result, the pre-enactment plea that previously allowed for Section 1182(c) relief would now cause mandatory deportation. Regardless of whether the change in law is viewed as attaching a new disability, *Landgraf*, 511 U.S. at 269 & n.23 (citing *Soc'y for the Propagation of Gospel v. Wheeler*, 22 F. Cas. 756, 767 (C.C.N.H. 1814)); *Hamilton Murray v. Gibson*, 56 U.S. 421, 424 (1853) (inability to introduce evidence of past judgment); as increasing a liability for past conduct, *Landgraf*, 511 U.S. at 280; *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 304, 313 (1994); as sweeping away settled expectations without individualized consideration, *Landgraf*, 511 U.S. at 266; or as eliminating a functional defense to removal, *see Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 948 (1997), it would constitute a new legal consequence, namely precluding application for the Section 1182(c) waiver and thereby compelling deportation.[28]

Under the government's view, any legal resident who is subjected to immigration proceedings after April 1, 1997 would be barred from seeking Section 1182(c) relief. Thus, immigrants whose criminal offense occurred years or decades earlier would be barred even though they were indisputably eligible for the waiver at that time and the INS did not, for whatever reason, initiate proceedings. Because

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of impermissible retroactivity." *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 947 (1997).

[28] The severity of deportation is undisputed. *See, e.g., Barber v. Gonzales*, 347 U.S. 637, 642 (1954) ("Although not penal in character, deportation statutes as a practical matter inflict 'the equivalent of banishment or exile.'") (*quoting Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948)). The severity is all the greater in the case of legal residents who have developed the ties that go with permanent residence. *See Landon v. Plasencia*, 459 U.S. 21, 32 (1982).

the immigration laws contain no statute of limitations, immigrants who made decisions in their criminal cases on the basis of the then-governing immigration law, whose criminal convictions may have occurred long ago, who have acted in complete compliance with the law since then, and who now may have the *strongest* claims for equitable relief, would be completely barred. In *Velasquez v. Reno*, 37 F. Supp. 2d 663 (D.N.J. 1999), for example, a single conviction nineteen years ago that resulted in probation would serve as the basis for extinguishing legal resident status and compel the respondent's deportation without regard to decades of positive equities. *See generally supra* note 16 (collecting cases); Brief *Amici Curiae* of the Florida Immigrant Advocacy Center, *et al.* (collecting examples).

In *Costello v. INS*, 376 U.S. 120 (1963), this Court recognized that legal residents who are charged with crimes make decisions – including whether and how to plead guilty – based on the impact that their decisions will have on the likelihood of deportation and the opportunity to seek discretionary relief. In that case, the Court considered whether criminal convictions that occurred when the defendant was deemed to be a citizen could subsequently be used as the basis for deportation when the defendant had lost his citizenship status. The Court held that the deportation could not be based on those criminal convictions because the alien might have made different strategic judgments or offered to plead guilty to a particular count based on the immigration consequences of the conviction:

> [T]he petitioner points out that had he held alienage status at the time of his trial for income tax evasion, he could have offered to plead guilty to one count of the indictment in return for a nolle prosequi of the other counts, and that the conviction on one count would not have made him subject to deportation . . . .

Id. at 130-31. *See also Fiswick v. United States*, 329 U.S. 211, 221-22 (1946) (potential hazards of deportation constitute a serious collateral consequence that prevents an appeal of a criminal conviction from becoming moot). *Costello* further

noted the importance of the opportunity to seek discretionary relief. The decision emphasized that if the defendant had been an alien at the time of the conviction, he could have applied for relief authorized by the immigration act. "Even more important, had petitioner been an alien at the time of his convictions, he could have availed himself of the supplementary relief procedure provided for" by the INA. *Costello*, 376 U.S. at 131.[29]

As *Landgraf* and *Martin v. Hadix* explained, "fair notice, reasonable reliance and settled expectations" are the touchstones that guide retroactivity analysis. *Martin v. Hadix*, 527 U.S. at 358 (citing *Landgraf*, 511 U.S. at 270). Just as the defendant in *Landgraf* was entitled to notice of the degree of liability for unlawful sexual harassment, 511 U.S. at 281-85, so a legal resident immigrant is entitled to notice of a change in immigration liability resulting from his behavior. *See also Rivers*, 511 U.S. at 309-10 (defendant entitled to notice of statutory basis for liability even when prior law had been interpreted as creating liability); *Hughes Aircraft*, 520 U.S. at 947-51 (defendant entitled to notice of change in defense against *qui tam* relator, even when there was no defense against United States for action based on the same underlying fraud). As the Court has long recognized in relation to the deportation consequences of criminal convictions, notice to legal residents is essential. *See Jordan v. De George*, 341 U.S. 223, 230 (1951) (evaluating deportability grounds under vagueness doctrine to determine whether the statute "fairly apprise[d] aliens of the consequences which follow after conviction and sentence"); *see also id.* at 243 (Jackson, J., dissenting) (notice of the circumstances that will lead to deportation recognizes that "[d]eportation proceedings technically are not criminal; but practically they are for they

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[29] *Costello* referred to a "judicial recommendation against deportation," which the alien could request in the criminal proceeding and which operated, like Section 1182(c), as a mechanism for tailoring the deportation law to the individual facts of the case.

extend the criminal process of sentencing to include on the same conviction an additional punishment of deportation").

Likewise, reasonable reliance and settled expectations are upset by a new legal regime that deprives legal residents of the waiver eligibility they had under the immigration statutes at the time they entered into plea agreements. For noncitizens, the opportunity to preserve their lawful resident status is often the foremost concern when confronted with prosecution for a deportable criminal offense. As courts have regularly recognized, a significant consideration that immigrants and their counsel weigh in the criminal justice system is the likelihood of deportation and the eligibility for Section 1182(c) relief. *See, e.g., Jideonwo v. INS*, 224 F.3d 692, 695 (7th Cir. 2000); *Tasios v. Reno*, 204 F.3d 544, 546 (4th Cir. 2000); *Reverdes v. Reno*, 95 F. Supp. 2d 22, 28 (D. Mass. 2000); *Tam v. Reno*, No. 98-C2835, 1999 WL 163055, at *1 (N.D. Cal. Mar. 22, 1999), *rev'd on other grounds*, 2001 WL 30677 (9th Cir. Jan. 11, 2001).

In some cases, those considerations are evidenced directly in the plea negotiation. For example, in *Jideonwo*, the court noted that the "sentence was the subject of considerable negotiation between the government and Jideonwo's attorney," 224 F.3d at 695, and that "*the whole point* of the plea negotiations in [Jideonwo's] criminal case" was to preserve the availability of equitable relief from deportation. *Id.* at 699 (emphasis added and internal quotation marks omitted). As a result of the negotiations with the prosecutors, Mr. Jideonwo agreed to provide "his assistance and that of his family in a federal drug investigation." *Id.* at 695. In turn, Mr. Jideonwo received a sentence that was a "considerable downward departure from the sentencing range for the crime to which he pled guilty," which preserved the availability of equitable relief from deportation. *Id.*[30]

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[30] *See also Tam*, 1999 WL 163055 (noting that public defender informed client that "he would have the right to seek relief from deportation under Section [1182(c)] of the INA as it

As evidenced by the actions and duties of lawyers and judges, the criminal justice system recognizes the close relationship between convictions, pleas, and deportation. Criminal defense lawyers, guided by ethical standards and numerous treatises, are obliged to advise legal residents of the immigration consequences of a guilty plea and whether the plea would preserve the opportunity for relief. *See* Brief *Amici Curiae* of the National Association of Criminal Defense Lawyers, *et al.* Prosecutors sometimes structure pleas in order to preserve equitable relief when the imposition of mandatory deportation would be too harsh a consequence given the facts of the case or the circumstances of the prosecution. *See Jideonwo*, 224 F.3d at 695 (prosecutor and defense lawyer structured plea to preserve availability of equitable relief); *cf. Allen v. Hardy*, 478 U.S. 255, 260 (1986) (prosecutors rely on the legal regime in place at the time of trial). In addition, judges in many states are required to ensure that defendants are aware that a decision to accept a plea could have immigration consequences.[31]

Legal residents who pled guilty before the change in law and, as a result, now face mandatory loss of their legal status, may have chosen to go to trial; may have sought to plead to other charges; may have pursued appeals; may have devoted greater resources to their defense; and may have focused on other issues in the criminal proceeding if they could have known the consequence of their plea under the

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stood at that time if he served a sentence of less than five years").

[31] *See* Conn. Gen. Stat. § 54-1j (1994 & Supp. 2000). *See also, e.g.*, Cal. Pen. Code § 1016.5 (West 1985); D.C. Code Ann. § 16-713 (1997 & Supp. 2000); Fla. R. Crim. P. 3.172(c)(8) (1999); Haw. Rev. Stat. Ann. § 802E-2 (Michie 1999); Mass. Gen. Laws Ann. ch. 278, § 29D (1992 & Supp. 2000); Mont. Code Ann. § 46-12-210(f) (1997); N.Y. Crim. Proc. Law § 220.50(7) (McKinney Supp. 1999); Ohio Rev. Code Ann. § 2943.031 (Banks-Baldwin 1997); Or. Rev. Stat. § 135.385(2)(d) (1997); Tex. Crim. Proc. Code Ann. § 26.13(a)(4) (West 1989); Wash. Rev. Code Ann. § 10.40.200 (West 1990); Wis. Stat. Ann. § 971.08(1)(c) (West 1998).

new law. *See* Brief *Amici Curiae* of the National Association of Criminal Defense Lawyers, *et al. Cf. Slusser v. Commodity Futures Trading Comm'n*, 210 F.3d 783, 786 (7th Cir. 2000) (Easterbrook, J.) (finding that new law cannot be applied retroactively in part because a "reasonable person in Slusser's position would have assumed that his maximum exposure was $600,000 and financed his defense accordingly"). Because the INA's statutory definition of "aggravated felony" is highly technical and bears no intuitive relationship to the designation of offenses under the criminal law (*see supra* notes 14 & 15), the change to a regime in which an aggravated felony conviction alone (without regard to the sentence served) compels deportation will significantly alter the critical issues in a criminal case.[32]

Notwithstanding the new legal consequences that the statute would impose, the government argues that there can be no retroactive effect. Pet. Br. 43-45. The fact that the new statute imposes additional consequences on conduct that was already unlawful does not, of course, diminish the retroactive effect. "Even when the conduct in question is morally reprehensible or illegal, a degree of unfairness is

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[32] For instance, the only criterion for determining whether a conviction for fraud or tax conviction constitutes a disqualifying "aggravated felony" is whether the amount of loss exceeds $10,000. 8 U.S.C. 1101(a)(43)(M). Unless that is the case at the time of trial, defendants will not know to focus on the amount of the alleged loss as a critical matter on which to offer proof in addition to the other issues that are present in the case. Similarly, in the case of theft crimes, the only criterion in determining whether the crime will be classified as an aggravated felony is whether the sentence is one year, even if the sentence is suspended. Therefore, in negotiations over a plea and sentence, a legal resident must pay close attention to the nominal sentence, even if the sentence will be suspended. Indeed, a person who is eager to preserve the opportunity for relief and prevent mandatory deportation would choose a shorter definite sentence (even though it would require imprisonment) over a longer suspended sentence (that would not require any imprisonment).

inherent whenever the law imposes additional burdens based on conduct that occurred in the past." *Landgraf*, 511 U.S. at 283 n.35. The Court has repeatedly found retroactive effect even though the underlying conduct was already sanctionable under prior law. *See, e.g., Hughes Aircraft*, 520 U.S. at 947; *Rivers*, 511 U.S. at 301-02, 313.

The fact that Section 1182(c) relief is "discretionary" is equally beside the point. Changes affecting the opportunity to prevent a consequence have a retroactive effect, even if those consequences depend on the decisions of others. In *Hughes Aircraft*, the Court held that a change in law had a retroactive effect, even though the change at issue – the elimination of a particular defense in a private suit – did not affect petitioner's maximum liability. 520 U.S. at 948. Rather, the change only made it more likely that the petitioner would be subject to suit because the government might exercise its discretion differently than a private litigant. *Id.* at 949.[33] The Court held that such a change had an impermissible retroactive effect because, as a functional matter, it "attach[ed] a new disability." *Id.* at 948 (quoting *Landgraf*, 511 U.S. at 269). *See Tasios*, 204 F.3d at 553 (Luttig, J., concurring) ("I join the court's opinion with respect to the retroactive effect [of the elimination of Section 1182(c)] largely, though not exclusively, because of the Supreme Court's decision in *Hughes Aircraft Co. v. United States ex rel. Schumer . . . .*"). *See also Louis Vuitton v. Spencer Handbags Corp.*, 765 F.2d 966, 970 (2d Cir. 1985) (denying retroactive application to statute that made treble damages the presumptive award, rather than the maximum possible award). *Cf. Costello v. INS*, 376 U.S. 120

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[33] At issue in *Hughes Aircraft* was the *qui tam* provision of the False Claims Act, 31 U.S.C. 3730(b). Under pre-1986 law, a party could defend against such a *qui tam* action on the grounds that the false information that formed the basis for the suit was already in the government's possession; a 1986 amendment, however, removed this defense. The question before the Court was whether the amendment eliminating the defense should apply to conduct pre-dating the amendment's enactment. *Hughes Aircraft*, 520 U.S. at 941.

(1964) (noting importance of opportunity for alien to apply for discretionary relief from deportation based on criminal conviction).

In the related context of the Ex Post Facto Clause – which the Court has regularly turned to in analyzing whether a civil statute is impermissibly retroactive, *see, e.g., Hughes Aircraft*, 520 U.S. at 948 (citing *Collins v. Youngblood*, 497 U.S. 37 (1990) and *Beazell v. Ohio*, 269 U.S. 167 (1925)); *Landgraf*, 511 U.S. at 266-67, 269 n.23 (citing *Miller v. Florida*, 482 U.S. 423 (1987) and *De Veau v. Braisted*, 363 U.S. 144, 160 (1960)) – a change affecting the likelihood of relief is impermissibly retroactive, even when the maximum consequences are unaltered and the relief is discretionary.

In *Lindsey v. Washington*, 301 U.S. 397 (1937), the Court held that the change from a maximum indeterminate sentence to an equally long mandatory sentence was impermissibly retroactive. Even though the petitioners could have been sentenced to the identical prison sentence terms, the Court found an additional disability because it removed the *possibility* of a lighter sentence. "Removal of the *possibility* of a sentence of less than fifteen years . . . operates to [defendants'] detriment" because "[i]t is plainly to the substantial disadvantage of petitioners to be deprived of all *opportunity*" to receive a lower sentence. *Id.* at 401-02 (emphases added).

Similarly, in *Weaver v. Graham*, 450 U.S. 24, 36 (1981), the Court held that a statute affecting the "gain-time" credits affecting prisoners' early release operated retroactively even though the change did not affect the maximum possible penalty. The Court recognized that the gain-time allowance "is an act of grace rather than a vested right," *id.* at 28; *see also id.* at 30-31 (gain-time accorded "by the grace of the legislature"), but nonetheless held that the petitioner was "disadvantaged by the *reduced opportunity*" to shorten his time in prison. *Id.* at 33-34 (emphasis added); *see also id.* at 37 (Blackmun, J., concurring in the judgment) (new statute "remove[d] some of petitioner's hope and a portion of his opportunity").

Hughes Aircraft, *Lindsey*, and *Weaver* definitively refute the contention that a change affecting the opportunity for a

favorable exercise of discretion does not have an impermissible retroactive effect. Indeed, Section 1182(c) relief from deportation is less discretionary and more predictable[34] than the situations in *Hughes Aircraft*, 520 U.S. at 949 (depending on discretionary decisions of prosecutors); *Lindsey*, 301 U.S. at 797-98 (depending on sentencer's decision in fixing an indeterminate sentence); and *Weaver*, 450 U.S. at 26 & n.2, 28, 35 n.19 (depending on grant of gain-time credits, even when created by legislature as act of grace and awarded when prisoner "has performed in a faithful, diligent, industrious, orderly and peaceful manner, the work, duties and tasks assigned to him" and on other discretionary bases). As the Fourth Circuit concluded: "It is of no consequence here that [Section 1182(c)] relief is discretionary. . . . [A]ny change from a system of discretionary relief to one of prescribed outcomes is retroactive." *Tasios*, 204 F.3d at 522.

The government also argues that pleas are not a relevant event for retroactivity analysis because the immigration statutes speak in terms of convictions. That is an artificial distinction. This Court has emphasized that the retroactivity inquiry "demands a common sense functional judgment" of whether new legal consequences attach. *Martin v. Hadix*, 527 U.S. at 345. For legal residents (like respondent) who pled guilty under the prior legal regime, convictions based on pleas rendered them deportable and now prohibit their eligibility for relief. Moreover, as the court of appeals and other courts have recognized, a guilty plea is the point at which the reliance aspect of retroactivity is most plainly present. *See* Pet. App. 26a-29a; *Tasios*, 204 F.3d at 551 (noting that alien may act in reliance on the prospect of Section 1182(c) relief by waiving right to trial and pleading guilty). Furthermore, as in *Hughes Aircraft*, the Court need not decide the precise event for all cases, *see* 520 U.S. at 946 n.4 (not deciding which

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[34] The standards governing an IJ's exercise of discretion for adjudication of Section 1182(c) waivers are established by decades of BIA precedent. *See supra* note 1 and accompanying text.

is a relevant event for retroactivity), since whether the relevant event is considered the criminal conduct, the plea, or the conviction, all of the relevant events occurred for this respondent prior to the enactment of the new law.[35]

Finally, the government compares the elimination of discretionary relief from deportation to a court's injunction and argues that the change in law does not, therefore, impose a retroactive effect. Pet. Br. 42-43. Cases concerning injunctions are, however, wholly distinct. An injunction is a continuing order of the Court that is always subject to revision based on changes in the law. *See Miller v. French*, 530 U.S. 327, 344 (2000). A removal hearing for a legal resident, in contrast, is an adjudication of whether a status should be revoked based on a past event. Although current facts are relevant, an award of Section 1182(c) relief – unlike an injunction – is not conditional, is not subject to revocation based on subsequent events, and leads to a final determination on the charge of deportability. *See Matter of Przygocki*, 17 I. & N. Dec. 361 (BIA 1980) (award of relief under Section 1182(c) is not conditional); *see also Matter of Gordon*, 20 I. & N. Dec. 52 (BIA 1989). In short, "[w]hen determining whether a new statute operates retroactively, it is not enough to attach a label (*e.g.*, 'procedural', 'collateral') to the statute; we must ask whether the statute operates retroactively." *Martin v. Hadix*, 527 U.S. at 359.

C. There Is No Deportation Exception To The Presumption Against Retroactivity.

1. Although the government presents its argument as fitting within this Court's retroactivity jurisprudence, its principal claim is that changes in the law affecting a legal resident's ongoing right to remain in this country can never

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[35] In selecting the relevant event, this Court has looked to the irrevocable act of the person who would suffer the effects of the new law. *See Martin v. Hadix*, 527 U.S. at 360 (relevant date is work performed before notice of the new cap on attorney's fees).

qualify as retroactive. *See* Pet. Br. 40 (asserting that Congress's plenary power over immigration means that deportation laws, no matter how much they turn on past facts, are "inherently prospective" and not subject to the presumption against retroactive application of new statutes). This assertion is extraordinary, especially as applied to provisions that would extinguish the lawful status of legal residents. *See Landon v. Plasencia*, 459 U.S. 21, 32 (1982) ("Once an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly.").[36] The government also makes the related argument that there can be no retroactive effect because the disability occurs in the future. But, if a new law attaches a new disability based on past events, the disability necessarily occurs in the future. *See, e.g., Hamilton Murray v. Gibson*, 56 U.S. 421, 423-25 (1853) (ability to enforce prior judgments); *Society for the Propagation of the Gospel v. Wheeler*, 22 F. Cas. 756, 768 (C.C.N.H. 1814) (ability to enjoy unimpaired title to land). *Cf. Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 18 (1976) (treating imposition of costs of Black Lung program as retroactive although program addressed ongoing allocation of expenses of ongoing costs).

This Court has consistently applied the presumption against retroactive legislation in cases concerning the rights of legal residents who faced bars to reentry or deportation. In *Chew Heong v. United States*, 112 U.S. 536, 538-39 (1884), for example, a case cited and discussed by the *Landgraf* Court,

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[36] The government argues that there is no retroactive effect because immigration proceedings are designed to end an "ongoing violation of law." Pet. Br. 50-51. However, that has no application here where the aliens are legal permanent residents, at least until there is an entry of a final order of deportation – after adjudication of waiver applications. 8 C.F.R. 1.1(p); *Matter of Lok*, 18 I. & N. Dec. 101, 105 (BIA 1981) ("[L]awful permanent resident status of an alien . . . end[s] with the entry of a final administrative order of deportation."). In any case, Congress has provided for relief that aliens subject to deportation are eligible to pursue.

the issue was whether a Chinese legal resident of this country would be prohibited from reentering the United States based on a certificate requirement that was enacted after his departure. The government argued that entry should be barred based on the intervening law. The Court refused to read the statute as taking away a right to reenter possessed by the individual before his trip without a clear statement of congressional intent. Quoting *United States v. Heth*, 7 U.S. (3 Cranch) 399 (1806), a landmark case on the presumption against retroactivity, the Court endorsed and applied the established presumption against retroactive legislation. *Chew Heong*, 112 U.S. at 559 ("Words in a statute ought not to have retrospective operation unless they are so clear, strong and imperative that no other meaning can be annexed to them, or unless the intention of the Legislature cannot be otherwise satisfied; and such is the settled doctrine of this Court."). The Court reaffirmed this holding four years later in *United States v. Jung Ah Lung*, 124 U.S. 621, 633 (1888).[37] *See also Ng Fung Ho v. White*, 259 U.S. 276, 280-81 (1922) (avoiding issue of retroactive construction of deportation statute because there was an independent ground of deportability); *Luria v. United*

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[37] The government implicitly acknowledges the force of *Chew Heong* but suggests that it is different because it did not involve a claim to discretionary relief. As discussed above, that makes no difference. The government also seeks to distinguish *Chew Heong* on the ground that Congress had expressly granted the legal resident a right to remain. But the noncitizen in *Chew Heong* had no more right to remain than a permanent resident has under current law. *See Chew Heong*, 112 U.S. at 560 (explaining that the certificate provided the "privilege" to "go from and return to the United States"). The crucial point was that the Court would not read a retroactive intent into Congress's prior laws without an express statement from Congress. Notably, the noncitizens in *Chew Heong* and *Jung Ah Lung* were at the border seeking to enter, and these cases were decided before this Court recognized that returning legal residents have a greater constitutional status than other aliens at the border. *See Landon v. Plasencia*, 459 U.S. at 30.

States, 231 U.S. 9, 21-23 (1913) (finding express congressional intent to apply statute retroactively); *Kessler v. Strecker*, 307 U.S. 22, 30 (1939) (finding no express congressional intent to apply deportation statute to past acts).

Ultimately, the government conflates this Court's precedents regarding the constitutional power of Congress to enact retroactive deportation laws with the question of whether Congress "itself has determined that the benefits of retroactivity outweigh the potential for disruption or unfairness." *Landgraf*, 511 U.S. at 268. For example, the government quotes from *Mahler v. Eby*, 264 U.S. 32 (1924). Pet. Br. 41. *Mahler*, however, concerned a statute that included expressly retroactive grounds of deportability.[38]

The issue of Congress's constitutional power is entirely separate from the question of whether Congress has exercised its power. Indeed, this Court's decisions upholding the power of Congress to enact retroactive deportation laws followed cases in which this Court required a clear statement of Congress's intent to reach back in time and change the consequences of past acts. *See Fong Yue Ting v. United States*, 149 U.S. 698, 719-720 (1893) (describing how the constitutional issues were reached with respect to the Act of May 5, 1892, following the Court's earlier decisions in *Chew Heong* and *Jung Ah Lung*, which denied retrospective reach to earlier statutes that lacked express retroactive intent); *Harisiades v. Shaughnessy*, 342 U.S. 580, 587 n.15 (1952) (describing how constitutional issues were reached with respect to the Alien Registration Act of 1940, and following Court's earlier decision in *Kessler* in which the Court held that an earlier statute lacked clear intent to reach past acts). *See also Lehmann v. INS*, 353 U.S. 685, 690 (1957) (upholding constitutionality of retroactive provisions of the INA where Court found that it was

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[38] *See* Act of May 10, 1920, ch. 174, § 2, 41 Stat. 593 (providing for deportability of "aliens of the following classes" including "all aliens who since August 1, 1914, have been or may hereafter be convicted of any violation or conspiracy to violate [the Selective Service Act]").

"indisputable . . . that Congress was legislating retrospectively" through a statutory provision that applied "notwithstanding . . . that the facts by reason of which any such alien belongs to any of the classes enumerated . . . occurred prior to the date of enactment"). Under this authority, Congress may in some cases legislate retroactively in the immigration realm if it does so explicitly and rationally.[39] But whatever the power of Congress to enact retroactive laws, it must legislate expressly and assess the consequences of retroactive application of new deportation laws.

2. Finally, the government's decision to apply Section 304(b) retroactively cannot be saved by reliance on *Chevron* deference. *See Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). The first step of *Chevron* requires that courts employ the "traditional tools of statutory construction" to determine the meaning of the statute. *Id.* at 842 n.9. Included in these tools are established canons of interpretation. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 447-48 (1987). *See also NCUA v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 501 (1998); *EEOC v. Arabian-American Oil Co.*, 499 U.S. 244, 248 (1991). These "traditional tools of statutory construction" include the presumption against retroactive application

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[39] As the court below found, retroactive elimination of relief from deportation may raise issues of constitutionality under this Court's due process jurisprudence. Due process requires that Congress have a separate purpose that justifies the retroactive aspects of new legislation. *See Pension Benefit Guar. Corp. v. Gray*, 467 U.S. 717, 730 (1984). In addition, as the Seventh Circuit found in *Jideonwo v. INS*, 224 F.3d 692 (7th Cir. 2000), retroactive application raises difficult constitutional issues regarding the "mousetrapping" of criminal defendants who entered into pleas with the government in reliance on laws that did not preclude relief from deportation. *Id.* at 697-701. *See also Lehmann v. United States ex rel. Carson*, 353 U.S. 685, 690 (1957) (Black, J., dissenting) (arguing that retroactive deportation laws should be scrutinized under the Ex Post Facto clause).

of new statutes. *Landgraf*, 511 U.S. at 264. *See also, e.g., Goncalves v. Reno*, 144 F.3d 110, 127 (1st Cir. 1998).

Furthermore, the basic assumption underlying *Chevron* deference is that Congress left an ambiguity in a statute to be filled by the agency. *See Chevron*, 467 U.S. at 843. The *Landgraf* rule, however, is designed to resolve precisely such ambiguities in the case of retroactive laws. The purpose of the presumption against retroactivity is to assure that Congress has considered the unfairness of retroactive application and that absent an explicit *congressional* intent, the statute applies only prospectively. *See generally Henderson v. INS*, 157 F.3d 106, 129 n.29 (2d Cir. 1998) (retroactivity question is a "pure question of statutory construction for the courts to decide, . . . a question that is quite different from the question of interpretation that arises in each case in which the agency is required to apply [statutory] standards to a particular set of facts which involves the agency's particular expertise") (quoting *Goncalves*, 144 F.3d at 127) (alterations in original) (internal quotation marks omitted); *Jurado-Gutierrez v. Greene*, 190 F.3d 1135, 1148 (10th Cir. 1999) (deciding retroactivity question "without affording any deference" to Attorney General's decision because *Chevron* deference was inappropriate in that context), *cert. denied*, 529 U.S. 1041 (2000). *Cf. Massachusetts v. United States Dep't of Transp.*, 93 F.3d 890, 895 (D.C. Cir. 1996) (canon of construing statutes to avoid preemption of state laws is not subject to *Chevron* deference). Therefore, *Chevron* has no role in relation to the retroactivity question presented here.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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March 2001